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Dear Mr. Spangle, Mr. Gould, and Ms. Simonek:

Thank you for the opportunity to comment on the Draft Environmental Impact Statement/Environmental Impact Report (DEIS/EIR), Biological Assessment (BA), and Habitat Conservation Plan (HCP) for the Lower Colorado River Multi-Species Conservation Program (LCR MSCP), Arizona, Nevada, and California.

These draft documents fail to convince the reader that the proposed actions will "conserve habitat and work toward the recovery of threatened and endangered species, as well as reduce the likelihood of additional species being listed." The construction of 8,132 acres of native riparian habitat, and the reactive approach of restocking native fish rather than changing the conditions (e.g., a severely altered hydrograph and the presence of non-native fish) that threaten their survival, will not promote the recovery of listed species. Nor will these limited actions mitigate for the additional impacts caused by the further dewatering of the reaches between Parker and Imperial Dams, representing a loss of more than 28% of 'normal' flows, due to the projected change in point of diversion of as much as 1.574 million acre-feet (MAF) of Colorado River water. Further, the document fails to address the environmental impacts of shortage conditions on the system, which could very likely decrease the availability of water necessary to maintain the constructed habitats, as well as yet further decreasing groundwater levels, jeopardizing the survival of riparian species.

In general, the document misleads and deceives the reader, by comparing the impacts of

DW-1a

DW-1b

DW-1c

DW-2

the implementation of the LCR MSCP with a "no action" alternative that assumes that the covered activities would still occur. The question should not be whether limited habitat construction is preferable to this false alternative of no such habitat construction, but whether the limited conservation offered by the MSCP would compensate for, much less work toward the recovery of, the additional habitat that will be lost by the additional harms to the river due to the projected loss of an additional 1.574 MAF of water in reaches 4 & 5. An appropriate comparison, to meet the intent of NEPA, would be to inform the reader by comparing the benefits of the proposed action with the losses created by the 'covered actions,' and assessing whether the covered species can withstand these losses. We suspect that these losses far outweigh the potential benefits, but this draft document fails to provide sufficient information to make an informed comparison.

DW-2
con't

Neither the BA nor the HCP meet Endangered Species Act (ESA) requirements. Until the deficiencies outlined below are remedied, FWS cannot issue an incidental take permit (ITP) or biological opinion (BO).

DW-3

Reclamation's Biological Assessment is Insufficient

DW-4

The purpose of section 7 consultation is to insure that the agency action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). A jeopardy determination by FWS means that the action "would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. The BA does not contain a description of the action, does not contain the correct action area, does not evaluate the full range of impacts to listed species, and does not determine whether or not there is an adverse impact to listed species. Before submittal to FWS, Reclamation must remedy these defects, as described below.

Reclamation Must Better Define the Covered Actions

A biological assessment / request for initiation must contain a description of the action. 50 C.F.R. § 402.14(c)(1). First, the BA must make consistent the parties seeking consultation. The table of contents indicates six federal agencies are seeking ESA section 7 coverage: Reclamation; WAPA; NPS; BIA; FWS; and BLM. However, on pages 1-5 and 2-1, WAPA and BLM are omitted. Page 2-2, chapter 2 "describes the activities of four Federal agencies. . ." This is carried over to the HCP. See HCP at 1-6 (stating the BA covers federal actions of Reclamation, NPS and BIA).

WAPA Covered Actions

"WAPA will extend contracts to current customers and offer new contracts to new customers." BA at 2-78. This implies a non-discretionary activity, when in fact WAPA may offer amended contracts to current customers upon expiration. See HCP at 1-10 ("Upon termination, the contracts will either be extended or WAPA . . . will offer new contracts"). There would then be some flexibility in the timing and fluctuations of daily releases that could change

DW-5

for the benefit of the endangered native fishes. **DW-5 con't**

FWS Covered Actions

FWS's issuance of a section 10 permit is not consistently included in the list of covered actions. FWS must clarify if this BA serves for their intra-Service section 7 consultation, and if so, include in the assessment impacts analyses for the take permit. *See e.g.*, "This LCR MSCP BA serves as a written request . . . to initiate formal interagency consultation with the USFWS on actions conducted by Reclamation, the [] WAPA, the NPS, the BIA, and the BLM . . . This LCR MSCP BA also serves the USFWS for their intra-Service section 7 consultation on the issuance of a section 10 permit for the non-Federal covered activities and USFWS actions related to the diversion of water from the LCR." BA at 1-11. Later, though, intra-Service consultation is not among the actions described in Section 2.6.

DW-6

BLM Covered Actions

Please cite to the previous section 7 consultations to which BLM was a party. BA at 101. Please include those consultations in section 4.6, Consultation History. Please do the same for FWS, BIA, NPS and WAPA.

DW-7

Reclamation's Covered Actions

Delivery to contract holders

Reclamation states that "[a]nnual water deliveries to entitlement holders are nondiscretionary because such deliveries are required by the Decree and water contracts when water is available." BA at 2-8. *See also* Table 2-4; BA at 3-2. Reclamation further states that consultation with water users during Part 417 reviews is nondiscretionary. Table 2-19. These statements oversimplify and conflict with previous statements.

DW-8

In a previous BA written for the LSCP MSCP and incorporated in this document, Reclamation stated that the Secretary "may have limited discretion over such conditions as non-use, non-beneficial use, or water conservation." Description and Assessment of Operations, Maintenance, and Sensitive Species of the Lower Colorado River, Final Biological Assessment, August 1996 (1996 BA) at 25. In addition, regarding Part 417, Reclamation "may make annual determinations relating to water conservation measures and delivery, distribution and use of Colorado River water pursuant to 43 CFR Part 417." 1996 BA at 25. The BA goes on to say that the following actions are discretionary: "determination of which contractors will be consulted;" "determination that water orders are, or are not, within that reasonably required for beneficial use;" and "the amount water orders are reduced." 1996 BA at 25-26.¹

In fact, in 2003, Reclamation exercised its discretion through the Secretary's decision to initiate a Part 417 review of the Imperial Irrigation District's (IID) water order and use, and its subsequent decision to reduce deliveries to IID.

¹ The Department of the Interior reiterated this position during the proceedings in *Imperial Irrigation District v. Norton*, Case No. 03CV0069W (S.D. Cal. April 17, 2003).

Yuma Groundwater Pumping

DW-9

The BA and EIS/EIR state that the Yuma Area Water Resources Management Group Drainage Project, a Reclamation project, was projected to begin in 2003 but that Reclamation has not yet completed environmental compliance. BA at 2-44-46 and DEIS/DEIR at 4-25-26. If this project did begin last year, please cease any Project activity until environmental compliance is complete, so that Reclamation and the public can assess the impact of lowered groundwater levels on the limitrophe.

Inadvertent Overrun and Payback (IOP) Policy

DW-10

The BA has extended the IOP policy to Arizona users despite not doing so in the original proposal and its environmental impact statement. BA at 3-6. "The IOP modeling analysis assumed that Arizona's Colorado River agricultural users would not utilize the policy because they have no past record of exceeding their entitlements. Their entitlements appear to be more than adequate to cover the fluctuations in use commonly experienced." Final EIS, Implementation Agreement, IOP Policy and Related Federal Actions (Oct. 2002) at 11-228. This policy was analyzed over a 30-year period where it was assumed the Central Arizona Project would assume any overruns. Given that the baseline and/or future flow model showed shortage cuts to CAP, either the FEIS's assumption or the extension of the policy to Arizona users here is faulty.

Reclamation's Future Actions and Programmatic Coverage

DW-11

This chapter must address the process for ESA compliance for future actions. In other words, answer whether the federal agencies are seeking programmatic coverage, for which there will be future ESA consultations when the proposals and their impacts can be more defined. See e.g., BA at 2-10 ("In the event that Reclamation proposes to adopt shortage criteria in the future and such criteria are consistent with the information presented in Appendix J, Reclamation will seek ESA compliance for the criteria through the LCR MSCP"); BA at 2-31 ("Specific compliance actions will be undertaken, as appropriate, at any time any specific flow-related actions are proposed for Secretarial approval. Any such compliance will be consistent with, and be incorporated into, the LCR MSCP Conservation Plan, as appropriate"); cf. BA at 2-2 ("[A] Federal agency's inclusion of an action in this chapter is . . . a proposal for ESA coverage for the covered actions"); BA at 2-2-2-3 ("Reclamation intends that its actions be covered and included in the LCR MSCP BA as particularly described in the narrative and tabular portions of this chapter . . ."). Reclamation must explicitly state which actions are seeking coverage, and if the coverage is programmatic, describe how and when FWS will reexamine the covered action.

Take Authorizations

Reclamation must delete the reference to section 9 in the second full paragraph on BA page 2-2. The same applies to this statement on BA page 3-2 and HCP page 2-2: "Because Reclamation's role in water delivery is nondiscretionary and not subject to section 7 consultation, it is Reclamation's position that these activities do not create section 9

DW-12

responsibility for Reclamation." This is not supported by the ESA. "[T]he taking of a protected species by any person (including a federal agency) violates section 9 of the ESA" unless authorized via a section 7 consultation or section 10 incidental take permit. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1505 (9th Cir. 1995) (emphasis in original). There are no other waivers to section 9. See also 16 U.S.C. § 1538; HCP at 1-4.

DW-12 con't

Non-Federal Non-Flow Activities

The BA and HCP must clarify the extent to which stocking of non-native sport fish is a covered activity. In BA Section 6.3, it is considered a cause of cumulative effect (and therefore, not covered). In Section 5.6, it is a covered activity. See 5-79 (impacts of stocking on razorback sucker); 5-78 (impacts on bonytail). For example, Nevada stocks rainbow trout, but is not including the activity in the LCR MSCP. HCP at 2-18. The EIS/EIR, however, states that Nevada DOW is seeking coverage for trout stocking. EIR/EIR at 1-15. Please clarify whether Nevada's stocking efforts are covered by the MSCP or elsewhere, and adjust your impacts analysis accordingly.

DW-13

Reclamation Must Redefine the Scope of the Consultation, and Analyze Effects Accordingly

DW-14

Reclamation's request for consultation must contain a "description of the specific area that may be affected by the action." 50 C.F.R. § 402.14(c)(2) (emphasis added). Reclamation refers only to a "planning area" as adopted by the MSCP. See BA at 1-8. The planning area "comprises areas up to and including the full-pool elevations of Lakes Mead, Mohave, and Havasu and the historical floodplain of the Colorado River from Lake Mead to the SIB." *Id.* The regulations define 'action area' as "all areas to be affected directly or indirectly by the Federal action and not merely in the immediate area involved in the action." 50 C.F.R. § 402.02. Reclamation's definition incorrectly follows the MSCP "Planning Area" rather than area that may be affected by the covered activities. This definition does not comply with ESA regulations, is based on the location of Conservation Plan activities rather than location of impacts of Covered Activities, and is incorrect.

Reclamation argues that it has complied with this definition of action area, albeit in a roundabout fashion: "The effects of all covered Federal and non-Federal activities, whether discretionary or not, have therefore been described and covered in this LCR MSCP BA . . ." BA at 2-2 (emphasis added); see also HCP at 2-2. Unfortunately, this is simply untrue. Reclamation's discussion omits any impacts on U.S.-listed species and habitats which occur outside the Planning Area, including the razorback sucker, southwestern willow flycatcher, totoaba, vaquita, and desert pupfish.

DW-15

Reclamation attempts to justify this action area by postponing ESA compliance for proposed discretionary actions. See BA at 2-1 ("None of the Federal agencies covered by this LCR MSCP Conservation Plan are seeking ESA compliance through the LCR MSCP Conservation Plan for any potential impacts of proposed discretionary actions on species that may be listed pursuant to the ESA in the Republic of Mexico (i.e., outside the borders of the United States). To the extent that any such compliance may be required in the future pursuant to

DW-16

applicable law, the Federal agencies will address such compliance at the time any discretionary Federal actions are actually proposed.”). Reclamation has included actions in this BA because it seeks ESA coverage for that action; therefore, Reclamation must consult on all the impacts of the covered action at the time of the consultation. “[A] Federal agency’s inclusion of an action in this chapter is . . . a proposal for ESA coverage for the covered actions.” BA at 2-2. If any covered action has impacts in Mexico, this BA must expand the action area to encompass those impacts, regardless of the timing of the action. Until it does so, assertions like these -- the “Conservation Plan provides for conservation of covered species to address all Federal actions along the LCR described in Chapter 2 of the LCR MSCP BA,” HCP at 1-6 (emphasis added) -- are untrue.

DW-16 con’t

Reclamation Must Redefine Baseline Because It Is Already Below the Jeopardy Threshold

As a result of Reclamation’s failure to correctly define the action area, the environmental baseline and the effects analyses², which are based on the action area, are similarly flawed. See e.g., 50 C.F.R. § 402.02 (emphasis added) (“The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process”).

DW-17

In 1997, FWS found that effects to the bonytail chub, razorback sucker and southwestern willow flycatcher had already exceeded the jeopardy threshold. Biological and Conference Opinion on Lower Colorado River Operations and Maintenance, May 1997 (1997 BO) at 153, 155. However, the FWS failed to issue a legal RPA; a valid reasonable and prudent alternative allows the intended purpose of the proposed action to go forward while avoiding the conditions that would adversely modify critical habitat or jeopardize listed species. 50 C.F.R. §§ 402.02, 402.14(h). FWS stated that the RPA “will improve the baseline so that the status of the bonytail chub, razorback sucker, and southwestern willow flycatcher will improve to a point below the jeopardy threshold in the long-term, within the time frame of the MSCP.” 1997 BO at 157. Reclamation, even if it adhered to the RPA, would jeopardize these species past the 5-year timeframe of the BO.

DW-18

As it turns out, Reclamation did not adhere to the RPA, and several elements had not been completed when Reclamation reinitiated consultation in 2002. Reinitiation of Formal Section 7 Consultation on Lower Colorado River Operations and Maintenance, April 2002 (2002 BO) at 3 (“the requirements of some RPAs and RPMs have been completed”); BA at 4-15 (RPA from 1997 not completed). Looking back, we see a baseline below jeopardy in 1997, the failure to complete the RPA and RPMs, and findings that the environmental baseline as of 2002 had not significantly improved. 2002 BO at 18 (“[t]he end result of the past actions is a continuing

DW-19

² ‘Cumulative effects’ are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation. 50 C.F.R. § 402.02 (emphasis added). The key unanswered question in Section 6.4 is this: what is the net effect of the covered activities, the LCR MSCP and the future nonfederal activities? See BA at 6-6, comparing, but not accumulating, the effects of all these activities.

downward trend of riparian, marsh, and aquatic habitat diversity and quality in the LCR") and 2002 BO at 19 ("[i]n terms of physical habitat, the downward trend for species habitats seen in the 1997 environmental baseline continues to 2002 owing to the indirect effects of past actions and continued suppression and restriction of natural fluvial processes") (emphasis added). It is clear from previous consultations that the environmental baseline of the Lower Colorado River is below the jeopardy threshold, as determined in 1997, and with no significant improvement given the continuation of Reclamation's actions and the failure to adhere to RPAs and RPMs. This is the baseline that must be reflected in the BA. As discussed below, the conservation plan fails to alleviate effects of past, present and future actions that lead to jeopardy, in violation of the ESA.

DW-19 con't

No Determination of Adverse Impact

This BA must evaluate the effects of the covered activities on listed species and their habitats, including conclusions as to the adverse effect or adverse modification of critical habitat for listed species. 50 C.F.R. § 402.12(a), 402.14(c)(4). These effects are measured relative to the baseline. Throughout the BA, Reclamation fails to analyze impacts of covered activities relative to the baseline (e.g., comparing instead cumulative effects to direct and indirect effects, *see supra*, fn.1).

DW-20

For example, Lake Mead elevations will fall because of Upper basin depletions in the baseline/no action and proposed actions scenarios. BA at 5-13. What the discussion omits is that reservoir elevations will fall more under the proposed actions, due to the proposed actions (ISG and shortage criteria). In fact, should low inflows continue for a long time, and given that the model doesn't use traces from the dry years of 1990-2002, the proposed actions will have lower elevations before the baseline (2020) because of the proposed shortage criteria. Because both of these actions are discretionary, the characterization of impacts relative to the baseline is important for ESA purposes.

DW-21

Reclamation has improperly deleted ongoing operations and maintenance activities over the MSCP timeframe from the effects analysis. This is incorrect. These activities are included in chapter 2 of the BA and are covered activities. *See* BA at 2-2-2-3 ("Reclamation intends that its actions be covered and included in the LCR MSCP BA as particularly described in the narrative and tabular portions of this chapter . . ."). These activities have an adverse effect. *See e.g.*, 1997 BO (finding jeopardy due to operations and maintenance activities); 2002 BO (requiring conservation measures as part of the covered action).

DW-22

As a result, the BA and HCP consider only the impacts from future flow-related actions. *See e.g.*, BA at 5-5/HCP at 4-5 (assessing habitat impacts from drop in elevation due to changes in points of diversion, a future action). Lacking any analysis of ongoing operations and in light of previous jeopardy findings, Reclamation's cursory statement that ongoing operations "may" perpetuate degraded conditions and that quantification of adverse impacts is speculative but of no measurable impact, BA at 4-1, is incorrect and unsupportable. If ongoing operations are to be actions covered by this BA, and they must be, Reclamation must analyze their impacts and ensure that they avoid jeopardy.

DW-23

Reclamation acknowledges the loss of critical habitat for bonytail and razorback sucker.

DW-24

BA at 5-39, 5-44. Reclamation must analyze whether there is "destruction or adverse modification" critical habitat. In making this determination, Reclamation (and FWS in any biological opinion) must consider how this loss impacts the recovery of the species. *See Gifford Pinchot Task Force v. Fish and Wildlife Service*, No. 03-35279, slip op. at 10602 (9th Cir. Aug. 5, 2004) (holding that the definition of 'adverse modification' "gives too little protection to designated critical habitat").

DW-24
con't

The BA also fails to make any conclusions as to adverse effect as required by the ESA, 50 C.F.R. § 402.12(a). Chapter 5.5 discusses impacts in terms of take and lost habitat, but does not discuss what such take and habitat loss means for the species. Finally, Reclamation states, "any effects resulting from proposed discretionary activities described in the LCR MSCP BA are not significant." BA at 7-1. As with the statement above, there is no analysis to support this conclusion. Given that Reclamation has chosen to pool Federal and non-Federal activities, discretionary and non-discretionary, into the 'Covered Actions,' reasoning that it is difficult to parse out effects from non-discretionary activities from those that are discretionary³, how did Reclamation parse out the effects of a small subset of the covered activities -- those that are proposed and discretionary -- in order to conclude that they are not significant?

DW-25

Reclamation cannot double dip on conservation measures

Nearly all of the conservation measures from the Biological Opinion for Interim Surplus Criteria, Secretarial Implementation Agreements, and Conservation Measures on the Lower Colorado River, January 2001 (ISG BO) "will be credited against the LCR MSCP conservation measure requirements." BA at 1-3, 5-2. *See also* HCP at 5-47-48; EIS at 1-18. These conservation measures are part of the proposed action that underwent consultation in 2001, and thus are part of the environmental baseline for this BA. "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." 50 C.F.R. § 402.02. As a matter of fact, the 2001 consultation was part of the baseline for the 2002 consultation which the MSCP would supersede. FWS has already assumed that the measures have been implemented, reflected such in the baseline of the 2002 BO, and Reclamation cannot again credit them as mitigation for different covered actions. These include the first conservation measure for the ISC and all four for the 4.4 Plan. *See* ISG BO at 6-9.

DW-26

If Reclamation will not complete these conservation measures, Reclamation must reinitiate consultation on the ISG. *See* 50 C.F.R. § 402.16; BO at 23 ("conclusions of this BO are based on the full implementation of the project as described in the Description of the Proposed Action section of this document, including all conservation measures identified in the

³ *See* BA at 2-2/HCP at 2-2 ("The effects of all covered Federal and non-Federal activities, whether discretionary or not, have therefore been described and covered in this LCR MSCP HCP, as well as in the LCR MSCP BA prepared by Reclamation"); BA at 5-2 ("The effects of Federal flow-related activities addressed in the LCR MSCP BA cannot be separated from the effects of non-Federal flow-related activities addressed in the LCR MSCP HCP. Therefore, the impact analysis for flow-related activities encompasses both Federal and non-Federal flow-related activities, and the analysis and results are the same in the LCR MSCP BA and the LCR MSCP HCP").

2002 BA . . . Failure to implement the project as proposed, including any conservation measures, . . . may cause coverage under the incidental take statement of this BO to lapse and may require reinitiation of consultation"). This BA must also discuss the implementation of the 2002 BO's conservation measures.

DW-26 con't

Reclamation's Modeling Assumptions Are Not Reasoned

DW-27

The hydrological model is based on a set of assumptions that distort the results used to predict potential environmental impacts. These results understate the magnitude of potential impacts to the environmental resources within the affected area.

These assumptions include:

1. An incorrect starting elevation for Lake Mead, which distorts all of the projections of future elevations, surplus and shortage conditions, and other Mead operations. The model apparently assumes that the elevation of Lake Mead on December 31, 2002 is a reasonable approximation of current conditions. This is obviously false. According to Reclamation records, the elevation of Lake Mead at the end of 2002 was 1152.13', more than 27 feet higher than the projected elevation of Lake Mead at the end of 2004. This is a significant error. The model should use the best available data, and not outdated information that minimizes the potential for shortage.
2. The model's reliance on an incomplete set of historical traces generates an overly optimistic set of projections for water availability in the future. The discussion of these traces (see J-52) indicates that the most recent Colorado River flow data used was from 1991, ignoring 12 full years of records, which include the driest four-year period on record. The incomplete data input into the Index Sequential Model decreases the likelihood of system shortage.
3. The model fails to account for the likelihood that climate change will affect the hydrology of, and demand within, the Colorado River basin states. Climate change impacts could reduce inflows by as much as 20 percent.⁴ Such reductions in inflow would further exacerbate the trend toward system shortage, with resultant adverse impacts on habitat and listed species.
4. The model assumes that the ISG will be extended through 2051. Given: (1) MWD's deferral of surplus in 2003 and 2004; (2) the rapidly decreasing elevation of Lake Mead; (3) Arizona's concerns about shortage; and (4) MWD's failure to honor the spirit of its forbearance agreement with Arizona and the good faith demonstrated by the basin states generally, it seems extremely unlikely that the basin states would agree to extend the ISG.
5. The model assumes operation of the Yuma Desalting Plant in 2023. BA at 5-4. Reclamation must rephrase this assumption to remove any reference to operating the Plant; Reclamation may simply assume the bypass has been replaced without specifying how. If Reclamation continues with the assumption of operating the Plant, this BA must also consider the effects

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DW-30

⁴ See L. Nash and P. Gleick, 1991, The sensitivity of streamflow in the Colorado basin to climatic changes, *Journal of Hydrology* 125: 221-241 and L. Nash and P. Gleick, 1993, *The Colorado River Basin and Climatic Change: The Sensitivity of Streamflow and Water Supply to Variations in Temperature and Precipitation*, Washington, DC: US EPA, EPA230-R-93-009, 121 pp.

of such an assumption on listed species and their habitats. Operation of the Plant will have significant environmental impacts on the Colorado River delta, particularly the Cienega de Santa Clara.

DW-30 con't

The HCP Conservation Plan Does Not Meet the Statutory or Regulatory Requirements

DW-31

The ESA prohibits take of listed species unless allowed by the FWS via an incidental take permit if "any taking otherwise prohibited by section 1538(a)(1)(B) of this title if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B) (emphasis added). In addition to failure to comply with ESA sections 7 and 10 requirements, the LCR MSCP fails to comply with California wildlife laws, including the California ESA and Fish and Game Code.⁵

The Applicants have not specified the impacts of the incidental take

DW-32

According to the HCP Handbook, HCP boundaries should include all areas within which any permit activities likely to result in take are expected to occur (3-11). The document defines the planning area as "the historic floodplain of the lower Colorado River, from Lake Mead to the SIB ..." (DEIS/EIR at 2-34), though it fails to explain the exclusion of the river below the SIB and fails to explain the exclusion of the Salton Sea basin, which historically was fed by meanders and floods from the Colorado River. The geographic scope should clearly and explicitly explain the decision to exclude historic components of the Colorado River floodplain.

Within Reach 7, the Conservation Plan boundary does not follow the U.S.-Mexico Boundary (see DEIS/EIR Fig. 2.1-7). Does the Conservation Plan boundary follow the current route of the river? Does Reclamation have the authority to determine that this therefore constitutes the legal boundary of the United States? Or does the Conservation Plan intend to undertake activities in Mexico? If the MSCP plans to undertake activities in Mexico, as indicated by the map, why stop at the SIB?

DW-33

It is not clear from the maps and the narrative, for non-Federal non-flow related activities in particular, whether all such activities are within the planning area, and if not, the mechanism by which actions outside the planning area will achieve ESA compliance. For example, are all 234 miles of canals and 72 miles of drains in Arizona, HCP at 2-7, or the 313 miles of canals and 172 miles of drains in California, HCP at 2-14, within the planning area? Also, it is stated that conservation activities could occur in the tributaries. EIS/EIR at 2-34. Will this occur within the planning area?

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DW-35

The ESA requires the MSCP Conservation Plan specify "the impact which will likely result from such taking." 16 U.S.C. § 1539(a)(2)(A)(i); 50 C.F.R. § 17.22(b)(1)(iii)(A). The HCP Handbook states that the HCP should make explicit how take will be calculated. From the

DW-36

⁵ Furthermore, significance of adverse effect under NEPA is defined by more than intensity and context, cf. EIS/EIR at 3.0-1. Until the covered actions and the conservation plan deal with the need to comply with the California ESA and California Fish and Game Code, the MSCP violates state law, triggering significant adverse effects undocumented in the DEIS/EIR. See 40 C.F.R. § 1508.27(b)(10).

tables in the documents, it appears that take is considered both in terms of acres of affected habitat and individuals taken (via harm, harass, etc.). Please clarify that take is not calculated merely in terms of affected habitat, as stated in the DEIS/EIR at 3.4-29. The take and associated impacts that must be minimized and mitigated occurs through destruction of habitat and loss of individuals.

DW-36 con't

The Applicants Have Not Fully Considered Steps to Mitigate Take

DW-37

The ESA requires that the Conservation Plan specify "steps the applicant will take to minimize and mitigate" impacts resulting from take, 16 U.S.C. § 1539(a)(2)(A)(ii), and the FWS must find that the HCP "will, to the maximum extent practicable, minimize and mitigate the impacts of" any take, *id.* § 1539(a)(2)(B)(ii). For the reasons below, we believe the HCP as written does not meet these standards.

The commitments to fulfill many of the Handbook recommendations for minimization and mitigation are there, but they aren't described with enough specificity to allow FWS to make the determination that the conservation plan will minimize and mitigate, that it is the maximum extent practicable, because the HCP does not detail the when's, how much's, and most importantly, the how's. Many of the conservation measures rely on uncertain actions, such as non-existent Recovery Implementation Programs and inadequate water rights. The HCP also gives minimal service to the conservation opportunities in the limitrophe and Colorado River delta. As a result, the MSCP has not examined the most practicable conservation measures.

DW 38a

DW-38b

For example, the HCP acknowledges mitigation for permanent impacts should occur in perpetuity (HCP at 5-11) but leaves it open as to how, saying that there are a variety of options the MSCP may use. The HCP also acknowledges that mitigation must occur prior to adverse impacts (HCP at 4-23) but the timing of conservation measures is unknown (HCP at 4-26). The MSCP will maintain existing habitat for mitigation, but the criteria used to select habitat maintenance activities is unknown, the amount of habitat to be maintained is unknown, and there is no date by which there will be criteria (HCP at 5-8). The MSCP points out that there are 30 conservation areas (HCP at 5-19) totaling 37,500 acres in addition to agricultural land available for habitat creation. This presents an interesting question as to the certainty that habitat creation will minimize and mitigate impacts: by making nearly the entire planning area potentially suitable for habitat restoration, the success of such restoration is questionable, both in terms of actually restoring the habitat and the likelihood of it becoming occupied habitat. As if to acknowledge this, despite all this land availability, the HCP can't say that there will be 8,132 acres on which to restore habitat, mandating against a finding of mitigation. See HCP at 5-19 (sufficient land should be available). We also suggest, as does the HCP Handbook, that conservation area site-selection criteria include proximity of the area to the impact.

DW-39

Bonytail and Razorback Sucker

DW-40

In particular, the conservation measures for the bonytail and razorback sucker are insufficient to minimize and mitigate, and do not contribute to recovery because they are not actual plans and they are not consistent with past mitigation measures. The bonytail and razorback sucker are severely depleted, see Recovery Goals for Four Endangered Fishes of the

Colorado River (2002). There are no self-sustaining populations of bonytail in the wild and little or no recruitment of razorback sucker in the wild. *Id.* A conservation plan that lasts for 50 years and covers a significant portion of the species' range must address essential habitat requirements of native fish populations in order to ensure their long-term survival and recovery. See 63 Fed. Reg. 8859, 8861 (Feb. 23, 1998).

DW-40 con't

The measures to stock razorback suckers and bonytails are not targets, but assumptions. HCP at 5-40, 5-45. There is nothing to guarantee such stocking will occur, and in fact, it probably will not. (This is because the MSCP will cease stocking if there are factors in the reach that are not conducive to the survival of stocked fish -- as long as the threats of non-natives and the loss of ecosystem function remain, survival is questionable.) Should stocking cease, "other management, research, and monitoring needs that would minimize and mitigate incidental take" would be funded. What are these "other" actions, who and when determined, and how will we know they do indeed minimize and mitigate? Mitigation should compensate for lost habitat or individuals; research does not address the impacts. HCP Handbook at 3-23.

DW-41

Second, coordination with the Lower Colorado River Endangered Fish Recovery Implementation Program does nothing to minimize or mitigate the impacts of take, because there is no such Program. The FWS cannot rely on future actions that are not "reasonably certain to occur" to minimize and mitigate take. See 50 C.F.R. § 402.02; *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987). Three, the stocking assumptions, should they occur, are not consistent with other RPAs and conservation measures for these species. For example, in 1997 FWS required 300-600 acres of impoundments for native fish to avoid jeopardizing those fish over a 5-year period. The MSCP, on the other hand, proposes creating the same amount of habitat for to avoid jeopardy over a 50-year period and to contribute to recovery of the fish.

DW-42

Yellow-Billed Cuckoo

Similar to the performance criteria established to meet the foodchain needs of southwestern willow flycatchers (namely, moist soil conditions at appropriate times of the year), we recommend that a similar set of performance criteria be established to meet the foodchain needs of yellow-billed cuckoos, prior to implementation of the Program. Since such performance criteria are not provided for in the draft documents, we assume that sufficient science has not been developed to create such performance criteria. We recommend that an impartial group of scientists be convened, for a two or three day period, to determine appropriate foodchain conditions for the yellow-billed cuckoo, and that these conditions be incorporated into the revised LCR MSCP documents as performance criteria.

DW-43

Burrowing Owl

The LCR MSCP DEIR/DEIS fails to address the impacts to Burrowing Owls.

DW-44

A. The LCR MSCP fails to analyze and mitigate impacts to burrowing owls pursuant to CEQA.

The California Environmental Quality Act (CEQA) declares that it is the policy of the